Northern California District Council of Laborers, a/w Laborers International Union of North America, AFL–CIO *and* RMC Lonestar. Case 32–CD–135

November 6, 1992

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed July 23, 1992, by RMC Lonestar, the Employer, alleging that the Respondent, Northern California District Council of Laborers, affiliated with Laborers International Union of North America, AFL–CIO (Laborers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Laborers rather than to employees represented by Operating Engineers Local 3 of the International Union of Operating Engineers, AFL–CIO (Operating Engineers). The hearing was held on September 10, 1992, before Hearing Officer Charles H. Pernal Jr.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a California general partnership, is engaged in the business of manufacturing cement and ready-mix concrete and of mining rock, sand, and gravel. During the 12 months preceding the hearing, the Employer had gross revenues in excess of $500,000, and it purchased and received goods and materials which were valued in excess of $50,000 and were shipped directly to it from points outside the State of California. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and the Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer operates a rock and gravel quarry in Clayton, California. It employs operating engineers, laborers, and truckdrivers there. One of the tasks performed at the quarry is the drilling of holes in rock for the insertion of explosives. Prior to November 1991, employees represented by Laborers used an air track drill to perform this work. This drill has separate compressor and drilling components, which are connected by a hose. The operator of an air track drill stands on the ground next to the drill, which can make holes measuring 2 to 5 inches in diameter.

In November 1991, the Employer replaced its air track drill with a more powerful Ingersoll-Rand DM 30 rotary blasthole drill. The rotary drill is a single unit with an on-board compressor. The rotary drill operator occupies a cab in the machine, which can drill holes as large as 15 inches in diameter.

The Employer assigned the operation of the rotary drill to an employee represented by Laborers. Operating Engineers filed a contractual grievance over the assignment. By letter dated July 13, 1992, the Laborers advised the Employer that if the Employer displaced the laborer as drill operator, the Laborers would take all legal action at its avail, including, but not limited to, picketing. The Employer thereafter filed the charge in this case.

B. *Work in Dispute*

The disputed work involves the operation of the Ingersoll-Rand DM 30 blasthole drill at the Employer's Clayton, California rock quarry.

C. *Contentions of the Parties*

The Operating Engineers contends that the work in dispute should be awarded to employees represented by it on the basis of factors including collective-bargaining agreements, a 1954 jurisdictional agreement between the international unions, area and industry practice, relative skills, and economy and efficiency of operations.

The Employer appeared at the hearing but took no position with respect to which Union should be awarded the disputed work. The Laborers did not appear at the hearing. No briefs were filed.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute under Section 10(k) of the Act, it must be satisfied there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

The Laborers' July 13, 1992 letter to the Employer clearly claimed the work in dispute and threatened action, specifically including coercion by picketing, if the Employer displaced the laborer performing that work. In these circumstances, we find that reasonable cause exists to believe that the Laborers engaged in conduct which violated Section 8(b)(4)(D) of the Act.

The Employer and both of the Unions are parties to a multiemployer, multiunion collective-bargaining relationship. A contract which expired on July 15, 1991,

before the instant dispute arose, provided for binding tripartite arbitration. The parties have failed to negotiate a successor agreement. In December 1991, the Employers implemented their proposals for a new agreement.

Prior to the hearing, Operating Engineers filed a motion to quash notice of 10(k) hearing, on the grounds that the parties had agreed to submit the instant jurisdictional dispute to final and binding tripartite arbitration. On September 1, 1992, the Regional Director for Region 32 denied the motion, leaving the parties to raise the issue of tripartite arbitration at the hearing. The Operating Engineers specifically declined to renew its motion at the hearing. We therefore find that the parties do not have an agreed method for voluntary adjustment of the dispute. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making a determination of this dispute.

1. Certifications and collective-bargaining agreements

There are no certifications in the record applicable to the Employer's employees represented by either Union. As noted above, the Employer and both Unions were parties to a multiemployer, multiunion collective-bargaining agreement which expired on July 15, 1991. The Operating Engineers supplement to this agreement referred to the covered employee classification of ''Rotary Drill Operator.'' The Laborers supplement to this same agreement referred to the covered employee classification of ''Air Track Driller.'' The contract proposal implemented by the employers, including the Employer, in December 1991 includes references to the same classifications for each union. We therefore find that this factor favors an award of the work in dispute to employees represented by Operating Engineers.

2. Agreement between the Unions

In 1954, the International Unions of the Laborers and the Operating Engineers executed a jurisdictional memorandum of understanding. In relevant part, the memorandum stated:

> In the instance where the operation of the drill is separate from the compressor units supplying the power to the drill, the drill shall be operated by the Laborer and the equipment shall be operated and maintained by the Operating Engineer. In the instance where the prime mover is an integral part of the drill, then the operation of the equipment shall be by the Operating Engineer, with the understanding that the Blaster and/or member or members of the Laborers' Union in charge of the drilling of holes in preparation for blasting, shall indicate and control the type and place where the drilling is to be done.

As noted above, the drill and the compressor of the rotary drill are part of a single integrated unit, whereas the drill and compressor of the air track drill are separate units, connected by a hose. We find that this factor favors an assignment of the disputed work to the employees represented by Operating Engineers.

3. Company preference and past practice

The Employer assigned the operation of the rotary drill to an employee represented by the Laborers. The Employer's director of labor relations Richard Dodge testified, however, that the Company has no preference regarding which employees are awarded the disputed work. Furthermore, Jerry Richeson, an operating engineer for the Employer, testified that the Employer used a rotary drill for about 3 weeks in the fall of 1989. An operating engineer ran this machine during this brief period. We find that this factor does not conclusively favor an award of the disputed work to employees represented by either Laborers or Operating Engineers.

4. Area and industry practice

Operating Engineers District Representative Robert Delaney and Business Representative Mark August testified regarding area and industry practice. Both testified that, with the exception of RMC Lonestar, all employers in the multiemployer bargaining group as well as other employers in the Northern California area assigned the operation of rotary drills to employees represented by Operating Engineers. Furthermore, Delaney testified that he was aware of no other company in the rock, sand, and gravel industry in Northern California which assigns the work of operating the rotary drill to employees represented by Laborers. We find that the factor of area and industry practice favors an award of the disputed work to employees represented by Operating Engineers.

5. Relative skills

The record indicates that Operating Engineers have apprenticeship programs and on-the-job training specifically designed to teach engineers how to operate heavy, mobile equipment such as the rotary drill. The record also shows that the Laborers-represented em-

ployee who is currently operating the drill was trained in its use by employees represented by Operating Engineers. It therefore appears that Operating Engineers-represented employees are better trained to perform the disputed work. Accordingly, we find that this factor favors an award to employees represented by Operating Engineers.

6. Economy and efficiency of operations

The record indicates that it is only necessary to drill blastholes at intermittent intervals. Operating Engineers agent Delaney testified that when the rotary drill is not in use, an employee represented by Operating Engineers could operate other heavy machinery, such as a bulldozer, or could work on equipment repairs, without a significant loss of worktime. There was no evidence, however, that employees represented by Laborers could not similarly return to other functions at the site when not operating the drill. Under the circumstances, this factor does not support an award of the work to either group of employees.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Operating Engineers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, agreements between the international unions, area and industry practice, and relative skills. In making this determination, we are awarding the work to employees represented by Operating Engineers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of RMC Lonestar, represented by Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO, are entitled to perform the work of operating the Ingersoll-Rand DM 30 blasthole drill at the Employer's Clayton, California rock quarry.

2. Northern California District Council of Laborers, affiliated with Laborers International Union of North America, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force RMC Lonestar to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Northern California District Council of Laborers, affiliated with Laborers International Union of North America, AFL–CIO shall notify the Regional Director for Region 32 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.